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IN THE
COURT OF APPEALS OF INDIANA

ROCHELLE FICHTER,	)	
	)	
Appellant,	)	
	)	
vs.	)	No. 82A01-0609-CV-407
	)	
LARRY A. FICHTER,	)	
	)	
Appellee.	)	

APPEAL FROM THE VANDERBURGH SUPERIOR COURT
The Honorable Wayne Trockman, Judge
Cause No. 82D04-9608-DR-1030

June 29, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

NAJAM, Judge

STATEMENT OF THE CASE

Rochelle Fichter ("Mother") appeals the trial court's order modifying the child support payments and parenting time of Larry A. Fichter ("Father"). Mother raises four issues for our review, namely:

1. Whether the trial court erred in interpreting the parties' agreement regarding Father's child support obligation.

2. Whether the court's finding that Father paid $10,170 in nonconforming child support payments was clearly erroneous.

3. Whether the court clearly erred in finding that Mother and Father, either orally or through their conduct, had modified the portion of their original agreement that required Father to pay one-half of all uninsured medical expenses for the parties' children.

4. Whether the court manifestly abused its discretion when it modified Father's parenting time without discussion.

We reverse in part and remand with instructions.

FACTS AND PROCEDURAL HISTORY

On April 2, 1997, the trial court entered an order dissolving Mother and Father's marriage ("Dissolution Order"). In that order, the court incorporated the parties' Agreed Property Settlement, Child Custody and Support Agreement. Regarding the parents' visitation with their two minor children and Father's support payments, the Dissolution Order provided as follows:

> VISITATION: The Respondent/Husband shall have visitation with the parties' minor children alternating weekends and at all agreed and reasonable times.
>
> MEDICAL AND DENTAL: The parties have agreed to waive the percentage share division and will equally divide all uninsured medical, dental, pharmaceutical, optometric, and hospital expenses of the parties' minor children.

* * *

> SUPPORT: The Court now finds the weekly gross income of the Petitioner/Wife is four hundred eighty-one dollars ($481) and the weekly gross income of the Respondent/Husband is five hundred eighty dollars ($580).
>
> The child support guidelines propagated by the Supreme Court of the State of Indiana now indicates the weekly child support obligation should be one hundred sixty dollars ($160.00). The Petitioner/Wife is advised of her right to receive same and now waives her right to accept this amount of support at this time.
>
> Because the Respondent/Husband [is] absorbing the larger portion of the marital debts, the Respondent/Husband shall pay through the Clerk of this court, the sum of seventy-five dollars ($75.00) per week until the marital debt is paid or further order of the court.

Appellant's App. at 17-18.

On March 29, 2006, Mother filed a Verified Information for Contempt, alleging that Father had failed to comply with the Dissolution Order by not paying the full amount of child support he owed and by not paying his half of uninsured medical expenses. Mother calculated Father's child support at $160 per week after the marital debt was completely paid by Father, for a total arrearage of $74,850 as of July 5, 2006. The marital debt had been satisfied since October of 1997. In the alternative, Mother calculated Father's owed support at seventy-five dollars per week for the same time period, for a total arrearage of $36,300. Subsequently, Father filed a Petition to Modify Parenting Time.

On August 31, 2006, the trial court held a hearing on Mother's and Father's motions ("August hearing"). At that hearing, Father testified that he made support payments directly to Mother in cash and by check. Father also provided the court with a document he prepared that outlined those payments, which showed a total of $10,170

that Father had directly paid to Mother. In his testimony, Father attributed that entire sum to child support. In response, Mother testified that some of the payments Father characterized as child support were in fact rent payments that he owed her for living in the basement of her home for a time following the dissolution of their marriage. Mother also testified that Father did pay approximately $6,000 directly to her for support and uninsured medical expenses. Further, Mother stated that she had to work multiple jobs to financially support herself and the children, and that she stopped asking Father for child support after he called her "greedy and materialistic" and became angry with her for asking. Appellant's Brief at 5. Between January 30, 2006, and August 31, 2006, Father paid $1,850 in child support through the Vanderburgh County Clerk's Office.

Also at the hearing, Mother testified that there was a total of $20,616.51 in uninsured medical bills that had been unpaid. Father stated that he had paid medical bills that were presented to him by Mother, although that total amounted to only $972.30. And in response to a question from the court, Mother agreed that she and Father had modified the provision of the Dissolution Order pertaining to uninsured medical costs so that Father would not have to pay, in exchange for which Mother received "[p]eace of mind." Transcript at 54.

Regarding parenting time, Mother testified that the parents adhered to their original agreement stipulating a flexible parenting time schedule, and Father stated that he generally had regular and consistent parenting time with the children, that he has cared for the children while Mother was at work, and that he took time off of work to

spend time with the children. But Father also testified that, on occasion, Mother had denied Father access to the children despite prior agreements.

That same day, the trial court entered the following findings:

> 4. That the provisions relating to . . . the automatic increase of the child support attributable to the Respondent are ambiguous and as a result and in consideration of the fact that Petitioner's counsel drafted this instrument that ambiguity should be resolved in favor of the Respondent.
>
> 5. That the support attributable to the Respondent is in the amount of $75.00 per week and should continue at that rate until further order of this court.
>
> 6. That pursuant to this court's finding this court determines that the Respondent should have paid child support through August 25, 2006 in the amount of $31,200.00 and gives him credit for direct payments in the amount of $10,170.00 leaving a support arrearage . . . existing in the amount of $21,030.00 as of August 25, 2006.
>
> * * *
>
> 9. That the Petitioner asserts a claim for unpaid medical bills dating back to the time of the parties' dissolution and this court determines that the Respondent paid bills presented to him and the Petitioner failed to present bills to him timely for payment and therefore, the Respondent is not found in Contempt on the failure to pay these medical bills and is not ordered to pay these medical bills.
>
> 10. That the Respondent's Petition to Modify the existing parenting time should be granted and the Indiana Supreme Court's Parenting Time Guidelines should be implemented in full which would include that the Respondent be permitted to have overnight weekly parenting time with the parties' children on Thursday nights and returning the children to either school or such other appropriate place agreed to by the parties.

Appellant's App. at 7-9. This appeal ensued.

DISCUSSION AND DECISION

Standard of Review

The trial court entered findings of fact and conclusions thereon. Thus, we apply a two-tiered standard of review: first, we determine whether the evidence supports the findings and second, whether the findings support the judgment. Freese v. Burns, 771 N.E.2d 697, 700 (Ind. Ct. App. 2002), trans. denied. We do not weigh the evidence or judge the credibility of the witnesses but, rather, consider only that evidence most favorable to the judgment, together with the reasonable inferences that can be drawn therefrom. Scoleri v. Scoleri, 766 N.E.2d 1211, 1215 (Ind. Ct. App. 2002). The appellant must establish that the trial court's findings of fact are clearly erroneous. Freese, 771 N.E.2d at 701. Findings are clearly erroneous when a review of the record leaves us firmly convinced a mistake has been made. Id. However, we do not defer to conclusions of law, and a judgment is clearly erroneous if it relies on an incorrect legal standard. Id. To the extent that the court's findings do not cover a particular issue, a general judgment standard applies, under which we may affirm the trial court on any theory supported by the evidence. Ind. Farmers Mut. Ins. Co. v. Ellison, 679 N.E.2d 1378, 1381 (Ind. Ct. App. 1997), trans. denied.

Issue One: Child Support Owed

Mother first contends that the trial court erred in its interpretation, and subsequent determination, of Father's child support obligations. The parties agree that the trial court's Dissolution Order adopted their agreement, which was drafted by Mother. As such, the parties also agree that the interpretation of the terms regarding Father's child

support obligations should be made pursuant to contract law. See Niccum v. Niccum, 734 N.E.2d 637, 639 (Ind. Ct. App. 2000) (citing Myers v. Myers, 560 N.E.2d 39, 42 (Ind. 1990)).

The interpretation and construction of contract provisions is a function for the courts. Id. On appeal, our standard of review is essentially the same as that employed by the trial court. Id. Unless the terms of a contract are ambiguous, they will be given their plain and ordinary meaning. Id. The terms of a contract are not ambiguous merely because controversy exists between the parties concerning the proper interpretation of terms. Id. Where the terms of a contract are clear and unambiguous, the terms are conclusive and we will not construe the contract or look at extrinsic evidence, but will merely apply the contractual provisions. Id. However, when an award of child support deviates from the presumptive amount provided by the Indiana Child Support Guidelines, the trial court must make a finding that the guideline amount is unjust and state a factual basis for the deviation. In re Paternity of T.W.C., 645 N.E.2d 1128, 1130 (Ind. Ct. App. 1995). See Ind. Child Support Guideline 3(F) cmt. 3.

Here, again, the Dissolution Order describes Father's child support obligations as follows:

> SUPPORT: The Court now finds the weekly gross income of the Petitioner/Wife is four hundred eighty-one dollars ($481) and the weekly gross income of the Respondent/Husband is five hundred eighty dollars ($580).
>
> The child support guidelines propagated by the Supreme Court of the State of Indiana now indicates the weekly child support obligation should be one hundred sixty dollars ($160.00). The Petitioner/Wife is advised of her right to receive same and now waives her right to accept this amount of support at this time.

> Because the Respondent/Husband [is] absorbing the larger portion of the marital debts, the Respondent/Husband shall pay through the Clerk of this court, the sum of seventy-five dollars ($75.00) per week until the marital debt is paid or further order of the court.

Appellant's App. at 18. The trial court subsequently interpreted that language to be ambiguous, stating at the August hearing: "the Final Decree is ambiguous as to when the Father's support obligation was to increase from Seventy-Five [dollars] ($75.00) to One Sixty ($160.00)." Id. at 11. Thus, the court construed the ambiguity against Mother, as the drafter, and ordered that Father's support obligation remain at seventy-five dollars per week.

We cannot agree with the trial court's determination of the Dissolution Order's purported ambiguity. The Dissolution Order plainly states that Father shall pay $75.00 per week "until the marital debt is paid or further order of the court." Id. at 18 (emphasis added). The use of the disjunctive provides that Father's final payment on the marital debt was one of two independent conditions that would terminate his support obligation of $75.00 per week. And it is undisputed that upon such termination, Father's support obligation was to increase to $160.00 per week.

Further, in the Dissolution Order the trial court stated only one factual justification for Father's deviation from the Child Support Guidelines, namely, Father's assumption of "a larger portion of the marital debts." Id. The necessary conclusion is that, once that debt had been completely paid, the justification for deviating from the Guidelines no longer existed. That conclusion also is supported by Mother's qualification that she was only waiving her right to accept the guideline amount "at this time." Id. And as child support exists "for the use and the benefit of the child," Straub

v. B.M.T., 645 N.E.2d 597, 599 (Ind. 1994), we can find no reason in the record why the children here should be deprived the guideline amount now that the rationale for the original deviation no longer exists.

Nonetheless, Father alternatively suggests that the Dissolution Order is ambiguous in three other ways. First, Father contends that his support obligation was ambiguous because "the date and time at which the child support was to increase . . . was left open[]." Appellee's Brief at 7. But, again, the language of the order plainly states that Father was to pay $75.00 per week "until the marital debt is paid." Appellant's App. at 18. The plain reading of that language makes clear that "the date and time at which the child support was to increase" was once Father finished paying the marital debt. Second, Father maintains that "there were alternative provisions [indicated by the use of the disjunctive] . . . as to when the Support Guidelines [mandating $160.00 per week] would apply." Appellee's Brief at 7. However, Father provides no cogent reasoning as to how those alternative provisions created an ambiguity, and therefore that argument is waived. See Ind. Appellate Rule 46(A)(8)(a). Finally, Father asserts that an ambiguity exists because there is "no provision as to how the implementation of the Indiana Supreme Court Support Guidelines would impact upon Father's obligation to contribute towards the uninsured medical expenses." Appellee's Brief at 7. Again, Father provides no cogent reasoning as to why the plain language of his support obligation should result in a modification to his reimbursement of Mother's uninsured medical expenses. Thus, that argument also is waived. See App. R. 46(A)(8)(a).

We reverse the trial court's interpretation of Father's child support obligations. Accordingly, we also reverse the trial court's calculation of the amount of support Father owes in arrears. We remand with instructions that the trial court recalculate the amount of child support owed by Father from the date Father completely paid off the marital debt through the present in accordance with this opinion.

Issue Two: Nonconforming Support Credit

Mother next contends that the trial court erred in crediting Father with $10,170 in nonconforming child support payments. While Mother's argument on appeal seems to challenge the legitimacy of the court's award to Father of any credit, Mother admitted to the trial court that she received "approximately Six Thousand Dollars" in "child support payments" directly from Father. Transcript at 15. As such, Mother's argument on appeal is properly phrased as a dispute over the amount of Father's credit.

In determining the amount of Father's credit, the court expressly relied on Father's self-prepared ledger. That ledger shows that Father paid directly to Mother $10,170.38. Mother thus attacks the court's use of that ledger on two grounds.[1] First, Mother maintains that the ledger only demonstrates that Father paid $7,500 in actual child support, and that some of the payments Father references were in fact rent payments. However, at the August hearing, Father testified that he directly attributed

[1] In this section of her brief, Mother also maintains that the trial court erred "by assuming, without any supporting documentation or testimonial evidence, that Father was current for seventy-three (73) weeks—from April 4, 1997 through December 31, 1997, and from January 1, 2006, through August 31, 2006." Appellant's Brief at 14. But while the court's assumption may have had the practical effect of a credit for Father, the trial court, by the nature of its assumption, did not consider those time periods in its assessment of Father's credit. Thus, whether Father was in fact current with his child support payments during those times goes to the question of Father's arrearage, which, as discussed above, we remand for the trial court's reassessment.

the entire sum of the ledger to child support. Thus, Mother's argument here goes to the weight or credibility of Father's testimony, which we will not reassess. See Scoleri, 766 N.E.2d at 1215. Second, Mother contends that the ledger, which was supported in part by cancelled checks Father had written, is per se insufficient to establish credit for nonconforming payments. But, again, Mother admitted that she received some nonconforming child support payments from Father, and this contention therefore goes to the weight and credibility of the evidence before the trial court in determining the amount of that nonconforming support. We will not reweigh that evidence. See id. We cannot say that the trial court's finding regarding the amount of Father's credit was clearly erroneous.

Issue Three: Uninsured Medical Expenses

Third, Mother maintains that the trial court erroneously determined that Father was not responsible for paying one-half of the uninsured medical bills incurred by their children. As this is another provision of the Dissolution Order, we apply contract law principles to the interpretation of the Mother's and Father's obligations. See Niccum, 734 N.E.2d at 639 (citing Myers, 560 N.E.2d at 42). Regarding the parties' obligations for uninsured medical bills, the Dissolution Order states: "The parties have agreed to waive the percentage share division and will equally divide all uninsured medical, dental, pharmaceutical, optometric, and hospital expenses of the parties' minor children." Appellant's App. at 17.

At the August hearing, the trial court found that Mother and Father, either orally or through their conduct, had reached a new contractual agreement regarding the payment of uninsured medical expenses. Specifically, the court stated that:

> I thought you waited too long to present those [bills] to him, to take nine (9) years of medical bills and just to drop those in his lap . . . I just don't think is fair. I also think the two of you reached various agreements . . . and you as much said you brought [sic] peace, . . . don't bother me and [the] kids too much, and I'm really not going to hassle you too much on your financial obligations.

Id. at 11-12. Parties to a contract may modify their agreement either orally or through their conduct.[2] Gilliana v. Paniaguas, 708 N.E.2d 895, 897 (Ind. Ct. App. 1999), trans. denied. Questions regarding the modification of a contract are questions of fact. Id.

Here, the record adequately supports the court's order. During her testimony, the court asked Mother the following question: "So basically you're saying you didn't press the issue [of the uninsured medical bills] because you wanted . . . you traded money for peace with him, is that right?" Transcript at 54. In response, Mother stated: "Yes in a way you could say that. Peace of mind." Id. In addition, Mother does not dispute that she waited nine years to present Father with the $10,000 he allegedly owed for uninsured medical bills. On those facts, we cannot say that the trial court's finding that Mother and Father had modified their agreement, either orally or through their conduct, was clearly erroneous.

[2] For clarity, we emphasize that the trial court properly did not apply the parties' modification of the Dissolution Order to Father's child support obligations. As our supreme court has frequently stated, parties may not effect legal modifications of child support through informal means. See, e.g., Nill v. Martin, 686 N.E.2d 116, 118-19 (Ind. 1997).

Issue Four: Modified Parenting Time

Finally, Mother contends that the trial court erred in modifying Father's parenting time. "The court may modify an order granting or denying parenting time rights whenever modification would serve the best interest of the child." Ind. Code § 31-17-4-2 (West Supp. 2006). We reverse changes in parenting time only for manifest abuse of discretion. Huffman v. Huffman, 623 N.E.2d 445, 449 (Ind. Ct. App. 1993), trans. denied. We do not reweigh evidence or reassess witness credibility, and we consider only evidence that supports the trial court's decision. Id.

In its order, and at the August hearing, the trial court adopted Father's request to implement the Parenting Time Guidelines without discussion. Mother argues that the court erred by not considering whether there existed some change in circumstances to merit modification of the parenting time order. As the court's findings do not cover this issue, a general judgment standard applies and we may affirm the trial court on any theory supported by the evidence. Ellison, 679 N.E.2d at 1381.

Here, the original parenting time schedule was left open, with Father having access at "all agreed and reasonable times." Appellant's App. at 17. But at the August hearing, Father testified that Mother had, on occasion, denied him access to their children despite prior agreements. Specifically, Father stated that he and Mother agreed that Mother would have the children on Memorial Day and he would be allowed to have parenting time once a week. Father then testified that once Memorial Day had passed, Mother no longer permitted him to visit on a once-a-week basis. Father also testified that Mother did not allow him to exercise parenting time on alternating weekends, to which

they had further agreed. That evidence supports the trial court's decision that a modification in parenting time, to a well-defined schedule, was in the best interests of the parties' children.[3] See I.C. § 31-17-4-2. Thus, we cannot say that the trial court abused its discretion in modifying the parties' parenting time.

Conclusion

We reverse the trial court's interpretation of Father's child support obligation pursuant to the Dissolution Order. The contract unambiguously conditioned Father's seventy-five dollar per week payment on the existence of marital debt. Thus, we remand that issue with instructions that the trial court recalculate Father's child support arrearage from the date Father had completely paid off the marital debt to the present at the rate of $160 per week. In all other respects, we affirm the trial court.

Reversed in part and remanded with instructions.

RILEY, J., and BARNES, J., concur.

[3] This evidence also demonstrates that the parties had become increasingly unable to cooperate in forming a parenting-time schedule, and it thereby refutes Mother's specific contention that there was no change in circumstances.